

The Evolving Role of Citizens in United States-Canadian International Environmental Law Compliance*

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SYNOPSIS

Citizen participation is critical in environmental law compliance. While citizens often have a major role in advancing compliance with domestic environmental law, citizens have historically had a much more limited role in international environmental law. However, a new model is emerging in North America. The role of citizens in United States-Canadian international environmental law compliance has expanded greatly over the past several decades. Beginning in the 1970s with increased public participation in binational governance agreements and expanding in the past two decades to formal roles in monitoring implementation of international environmental agreements, citizen participation is now central to the United States-Canadian international environmental legal regime.

I. INTRODUCTION

Historically, the Westphalian tradition (named after the Peace of Westphalia that ended the Thirty Years' War over three centuries ago) of international law allowed only national govern-

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ments to address international matters.¹ Citizens had no direct role, and their interests could only be considered to the extent that they were espoused by their government.² Nevertheless, relying exclusively on national governments to address international environmental problems has proved to be inadequate. National governments are extremely reluctant to bring environmental claims against other nations, as every national government presides over a house with at least some glass, and the fear of retaliation or setting undesirable precedents often prevails over the interests of affected citizens.³

Relying exclusively on national governments for compliance also ignores the potentially powerful role that citizens can and do play in environmental law and policy. The International Joint Commission ("IJC"), the leading binational environmental governance institution in the United States-Canadian environmental law regime, has recognized the importance of citizens in advancing compliance:

Public support is crucial to restore and protect the environment. Active public involvement has had significant consequences for the environment. Direct public participation drives the development of regulations, conduct of cleanup actions, implementation of preventive measures and changes in societal attitudes. An informed and knowledgeable citizenry exerts a powerful influence on policy and decision-makers and allows the public to participate in policy development.⁴

One potential approach to empowering citizens in compliance is supranational adjudication, which allows citizens to bring a claim against a foreign government in an international tribunal.⁵ While this approach has been used in investment and trade agree-

1. Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798, 798 (2002).

2. See generally, Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001).

3. See David Wirth, *Reexamining Decision-Making in International Environmental Law*, 79 IOWA L. REV. 769, 779 (1994).

4. Int'l Joint Comm'n, *Ninth Biennial Report on Great Lakes Water Quality: Achieving the Future—how to do it: Perspective and Orientation* (1998), available at <http://www.ijc.org/php/publications/html/9br/achievee.html> [hereinafter *Ninth Biennial Report*].

5. See generally Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273 (1997).

ments,⁶ it has not found much support in the environmental arena where interests of state sovereignty seem to prevail.⁷ Supranational adjudication, however, is not the only way to give citizens a role in international environmental compliance and enforcement. Other approaches have evolved under the United States-Canadian international environmental legal regime that can serve as examples for other regions.

The international environmental legal regime between the United States and Canada provides an excellent case study for the emerging role of citizens in international environmental law compliance. The importance of the two countries' shared natural resources and the significant growth in economic trade between the two countries highlight the need for compliance with international environmental law. Further, just as the United States and Canada provided leading examples of the Westphalian approach to international environmental law in the first half of the twentieth century with the Boundary Waters Treaty of 1909⁸ and the landmark Trail Smelter arbitration,⁹ the evolving role of citizens in environmental law compliance could signal a new direction for international environmental law in the twenty-first century.

For those readers familiar with domestic environmental law in the United States, the evolving role of citizens in United States-Canadian international environmental law compliance may seem modest and ordinary. One of the underlying themes of domestic environmental law is the role of citizens in penetrating the "iron triangle" of "private construction and industrial interests, government agencies that service the industry, and congressional delegations that want to attract particular public expenditures into their backyards."¹⁰ Using this model, international environmental

6. See North American Free Trade Agreement, U.S.-Can.-Mex., ch. 11, sec. B, Dec. 17, 1992, 32 I.L.M. 605, 642, available at http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=160.

7. See generally John Knox, *Citizen Suits in International Environmental Law: The North American Experience*, 2 Sixth International Conference on Environmental Compliance and Enforcement: (2002), available at <http://www.inece.org/conf/proceedings2/42-KNOX%20NewALT.pdf>.

8. Boundary Waters Treaty of 1909, U.S.-Gr. Brit. (for Can.), Jan. 11, 1909, 36 Stat. 2448 [hereinafter Boundary Waters Treaty].

9. United States v. Canada, 3 R. Int'l Arb. Awards 1911 (1938), reprinted in 33 AM. J. INT'L L. 182 (1938) [hereinafter *Trail Smelter I*]; United States v. Canada 3 R. Int'l Arb. Awards 1938 (1941), reprinted in 35 AM. J. INT'L L. 684 (1941) [hereinafter *Trail Smelter II*].

10. ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 400 (3d ed. 2004).

matters differ in scale but not in the relevant players and goals. Citizens must have a similar role in international environmental law to penetrate the international iron triangle of multinational commercial interests, federal governments engaged in a “race to the bottom,”¹¹ and international governmental authorities that view commercial interests and the federal governments as their primary constituencies. From this perspective, the role of citizens in international environmental law compliance is a natural outgrowth of the role of citizens in domestic environmental law compliance.

Conversely, a very different perspective comes from the Westphalian tradition of international law. Under this view, international environmental matters and disputes are just one of the many types of international matters and disputes that can only be resolved between national governments.¹² National governments are left to assume the interests of their citizens in international affairs and, in doing so, they take positions on international environmental matters with all other diplomatic and international interests in mind. From this perspective, the interests and role of citizens in international environmental law compliance should be secondary to the interests and role of the respective federal governments.

This article explores the evolution of the citizens’ role in international environmental law compliance by examining the United States-Canadian international environmental law regime. The article begins with a brief description of the geographic, environmental, and economic setting that motivates the United States-Canadian international environmental legal regime. It then ex-

11. The “race to the bottom” refers to the potential risks for governments to continually lower their environmental protection standards in an effort to attract and retain businesses and other economic investment. Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1172 (1995). See generally Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); Alvin K. Klevorick, *The Race to the Bottom in a Federal System: Lessons from the World of Trade Policy*, 14 YALE L. & POL’Y REV. 177, 179 (1996).

12. As the leading scholar of international law at the turn of the twentieth century, Lassa Francis Oppenheim (1858-1919), affirmed, “The Law of Nations is a law for the intercourse of States with one another, not a law for individuals.” See LASSA OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE 2 (3rd ed. 1920). For a more contemporary discussion of the Westphalian tradition of international law, see Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, The European Way of Law)*, 47 Harv. Int’l L.J. 327 (2006).

amines the Boundary Waters Treaty of 1909¹³ and the Trail Smelter arbitration,¹⁴ in which the United States and Canadian national governments exercised primary compliance authority in the Westphalian tradition.¹⁵ The Boundary Waters Treaty of 1909 and Trail Smelter arbitration were intended to resolve international environmental disputes between the two federal governments with no formal role for citizens.¹⁶ In contrast, more modern agreements between the United States and Canada demonstrate a dramatic growth in the role of citizens in achieving compliance with international environmental law. The Great Lakes Water Quality Agreement (“GLWQA”),¹⁷ the Air Quality Agreement,¹⁸ and the North American Agreement on Environmental Cooperation (“NAAEC”)¹⁹ rely heavily on citizens to ensure compliance and implicitly recognize that the two federal governments may have more in common with each other than with citizens and other stakeholders on both sides of the border.²⁰ This article concludes by examining the future role of citizens in United States-Canadian international environmental law compliance.

As a final introductory note, it is important to define the key terms relating to the role of citizens in international environmental law compliance. First, the term “citizen” is defined broadly to include individual persons, nongovernmental organizations (“NGOs”), and sub-national governments (including American states and Canadian provinces). In other words, citizens are defined as the same persons, organizations, and governments that are not a party to traditional formal international treaties and agreements under the Westphalian tradition. “Compliance” can be a difficult concept to define in the field of international environ-

13. Boundary Waters Treaty, *supra* note 8.

14. *Trail Smelter I*, *supra* note 9; *Trail Smelter II*, *supra* note 9.

15. *See id.*

16. *See generally* Boundary Waters Treaty, *supra* note 8; *Trail Smelter I*, *supra* note 9; *Trail Smelter II*, *supra* note 9.

17. Great Lakes Water Quality Agreement, U.S.-Can., Apr. 15, 1972, 23.1 U.S.T. 301 [hereinafter GLWQA 1972]; Great Lakes Water Quality Agreement, as Amended, U.S.-Can., Nov. 22, 1978, 30 U.S.T. 1384 [hereinafter GLWQA 1978]; Protocol Between the United States of America and Canada, Amending the Agreement of November 22, 1978, U.S.-Can., Nov. 18, 1987, T.I.A.S. No. 11551 [hereinafter GLWQA 1987].

18. Agreement on Air Quality, U.S.-Can., Mar. 13, 1991, 30 I.L.M. 676 [hereinafter Air Quality Agreement].

19. North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., *opened for signature* Sept. 8, 1993, 32 I.L.M. 1480 [hereinafter NAAEC].

20. *See generally id.*; GLWQA 1972, *supra* note 17; GLWQA 1978, *supra* note 17; GLWQA 1987, *supra* note 17; Air Quality Agreement, *supra* note 18.

mental law. For purposes of this discussion, Professor Edith Brown Weiss' definition conveys the key aspects of compliance:

Compliance focuses not only on whether implementing measures are in effect, but also on whether there is compliance with the implementing actions. Compliance also measures the degree to which the actors whose behavior is targeted by the agreement, whether they be local governmental units, corporations, organizations, or individuals, conform to the implementing measures and obligations. The concept is much broader than solely that of enforcement, because it draws attention to ways of bringing countries into compliance with their obligations, not just on how to handle violations after they occur.²¹

II. THE UNITED STATES-CANADIAN ENVIRONMENTAL AND ECONOMIC SETTING

The United States and Canada share a 5,000 mile border (the longest in North America) that includes 150 rivers and lakes, a geographic setting that has "provided ample opportunity for the generation of international environmental disputes."²² Included in these boundary lakes and rivers are the Great Lakes and St. Lawrence River, the world's largest surface freshwater system, containing 95% of the fresh surface water in the United States and 18 to 20% of the world's supply.²³ About forty million Americans and Canadians rely on the shared boundary waters for their drinking supply.²⁴

The shared natural resources between Canada and the United States are paralleled by a tremendous economic relationship fueled by increased trade. Canada and the United States

21. Edith Brown Weiss, *Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths*, 32 U. RICH. L. REV. 1555, 1563 (1999).

22. Catherine A. Cooper, *The Management of International Environmental Disputes in the Context of Canada-United States Relations: A Survey and Evaluation of Techniques and Mechanisms*, 24 CAN. Y.B. INT'L L. 247, 249 (1986).

23. See J. David Prince, *State Control of Great Lakes Water Diversion*, 16 WM. MITCHELL L. REV. 107, 108 (1990); see also Great Lakes Comm'n, *Toward a Water Resources Management Decision Support System for the Great Lakes-St. Lawrence River Basin* 22 (2003), available at <http://www.glc.org/wateruse/wrmdss/finalreport/pdf/WR-Ch.1-2003.pdf>; LEE BOTTS & BRUCE KRUSHELNICKI, *THE GREAT LAKES: AN ENVIRONMENTAL ATLAS AND RESOURCE BOOK* (3d ed. 1999), available at <http://www.epa.gov/glnpo/atlas/glat-ch1.html>.

24. Int'l Joint Comm'n, *Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States* sec. 2, 10 (2000), available at <http://www.ijc.org/php/publications/html/finalreport.html#2>.

have “the world’s largest and most comprehensive trading relationship,” and “[s]ince the implementation of the Canada-U.S. Free Trade Agreement in 1989, two-way trade has tripled.”²⁵ In 2004, with over \$1.8 billion worth of goods and services crossing the border every single day, bilateral trade totaled about \$680 billion.²⁶ Canada and the United States also have “one of the world’s largest investment relationships. . . . In 2004, U.S. direct investment in Canada was worth more than \$228 billion, while Canadian direct investment in the United States was close to \$165 billion.”²⁷ While the causal relationship between increased international trade and transboundary pollution between the two countries is still debated,²⁸ the significance of the relationship, economically and environmentally, is clear.

III. THE WESTPHALIAN APPROACH TO INTERNATIONAL ENVIRONMENTAL LAW: THE BOUNDARY WATERS TREATY OF 1909 AND TRAIL SMELTER ARBITRATION

The two leading authorities from the first part of the twentieth century in the United States-Canadian international environmental law regime display the Westphalian approach to international environmental law. In both the Boundary Waters Treaty of 1909 and the Trail Smelter arbitration, citizens had no formal role in compliance.²⁹ Instead, compliance was the sole domain of the federal governments, which had essentially total discretion in deciding whether to pursue compliance.³⁰ While these authorities have provided a substantive foundation for international environmental law, they offered citizens a small role in ensuring compliance.

25. See Canada Dept. of Foreign Affairs & Int’l Trade, The Canada-U.S. Trade and Investment Partnership, http://geo.international.gc.ca/can-am/main/trade_and_investment/trade_partnership-en.asp (last visited Jan. 2, 2007).

26. *Id.*

27. *Id.*

28. See Jagdish Bhagwati & Herman E. Daly, *Debate: Does Free Trade Harm the Environment*, SCIENTIFIC AMERICAN, Nov. 1993, at 41, 41.

29. See Boundary Waters Treaty, *supra* note 8; *Trail Smelter I*, *supra* note 9; *Trail Smelter II*, *supra* note 9.

30. See Boundary Waters Treaty, *supra* note 8; *Trail Smelter I*, *supra* note 9; *Trail Smelter II*, *supra* note 9.

A. The Boundary Waters Treaty of 1909

The Boundary Waters Treaty of 1909³¹ has provided a substantive and governance foundation for addressing transboundary pollution between the United States and Canada for nearly a century. The origin of the Boundary Waters Treaty dates back to 1903, when the United States and Canada established the International Waterways Commission (“IWC”) to address potentially conflicting rights in the countries’ shared waterways.³² The IWC soon recommended that the United States and Canada adopt legal principles to govern uses of their shared waters and form an international body to further advance protection of boundary waters.³³ In 1907 the IWC proposed a draft treaty, modified during negotiations, which eventually led to the Boundary Waters Treaty of 1909.³⁴

The Boundary Waters Treaty primarily “provides for joint management and cooperation between the United States and Canada for the two countries’ shared boundary waters.”³⁵ The Treaty defines “boundary waters” as

the waters from main shore to main shore of the lakes and rivers and connecting waterways. . . along which the international boundary between the United States and. . . Canada passes. [sic] including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.³⁶

While tributary rivers and streams, as well as tributary groundwaters, are excluded from coverage, the Boundary Waters Treaty governs four of the five Great Lakes (Lakes Superior, Huron, Erie, and Ontario)—as only Lake Michigan sits entirely

31. Boundary Waters Treaty, *supra* note 8.

32. See Jennifer Woodward, *International Pollution Control: The United States and Canada - The International Joint Commission*, 9 N.Y.L. SCH. J. INT’L & COMP. L. 325, 326 (1988) (citing Int’l Joint Comm’n, *Sixth Annual Report on Water Quality* 10 (1978)).

33. *Id.*

34. *Id.*

35. Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 416 (2006); see Woodward, *supra* note 32, at 327.

36. Boundary Waters Treaty, *supra* note 8, Preliminary Article, 36 Stat. at 2448–49.

within the United States)—and hundreds of other rivers and lakes along the United States-Canadian border.³⁷

According to a leading authority on the history of the Boundary Waters Treaty, navigation and access to boundary waters,³⁸ not environmental management, was the principle concern at the time the Treaty was negotiated.³⁹ Nonetheless, the first draft of the proposed Treaty included “a provision ‘forbidding water pollution having transboundary consequences.’”⁴⁰ The international commission that would administer the Treaty would be “vested with ‘such police powers’ as might be necessary to ensure respect for this rule.”⁴¹ The United States Secretary of State objected to this provision, agreeing only to an anti-pollution provision limited to the defined boundary and transboundary waters over which the international commission would not have enforcement jurisdiction.⁴²

Thus, Article IV of the Boundary Waters Treaty simply provides: “It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.”⁴³ There was even opposition to this more limited provision in the United States Senate when ratification was being debated, founded on the risk of creating an international water pollution police power.⁴⁴ Canada, however, would not consent to the provision’s removal and, thus, responded by “assuring the United States” Senators that the provision “‘would be enforced only in more serious cases.’”⁴⁵

In addition to establishing legal obligations regarding the shared boundary waters, the Boundary Waters Treaty created the IJC, a six member investigative and adjudicative body comprised of political appointees which equally represented both the United

37. Hall, *supra* note 35, at 417; Woodward, *supra* note 32, at 327 n.14 (“Boundary waters other than the Great Lakes include the St. Croix River, between Maine and New Brunswick, and the Okanagan, Osoyoos, and Skagit Rivers, between Washington and British Columbia.”).

38. Stephen J. Toope & Jutta Brunnee, *Freshwater Regimes: The Mandate of the International Joint Commission*, 15 ARIZ. J. INT’L & COMP. L. 273, 277 (1998).

39. Woodward, *supra* note 32, at 327 (citing F.J.E. Jordan, *Great Lakes Pollution: A Framework for Action*, 5 OTTAWA L. REV. 65, 67 (1971)).

40. *Id.* (quoting Jordan, *supra* note 39, at 67).

41. *Id.* (quoting Jordan, *supra* note 39, at 67).

42. *Id.* (quoting Jordan, *supra* note 39, at 67).

43. Boundary Waters Treaty, *supra* note 8, art. IV, 36 Stat. at 2450.

44. Woodward, *supra* note 32, at 328 (quoting Jordan, *supra* note 39, at 67-68).

45. *Id.* at 328 (quoting Jordan, *supra* note 39, at 68).

States and Canada.⁴⁶ “[T]he International Joint Commission created by the Boundary Waters Treaty has been commended for its objectivity and leadership on environmental issues,”⁴⁷ but it is “severely limited in its ultimate adjudicative power. For a dispute to be submitted to the International Joint Commission for a binding arbitral decision, a reference is required by both countries. The Boundary Waters Treaty specifies that the consent of the U.S. Senate is required for such action.”⁴⁸ Consequently, if Canada alleges that industries in the United States are polluting boundary waters and injuring Canadian citizens’ health or the states’ property interests, both Canada and the United States Senate, with a two-thirds majority, must agree to submit the matter to the IJC.⁴⁹ As may be expected, this has never occurred in the history of the Boundary Waters Treaty.⁵⁰

“While binding dispute resolution pursuant to article X of the Boundary Waters Treaty has never occurred, dozens of issues have been referred to the International Joint Commission for non-binding investigative reports and studies pursuant to article IX.”⁵¹ The Boundary Waters Treaty only requires a reference from one of the countries to invoke this process, however as a matter of custom, this has always been done bilaterally with the support of both countries (consent of the United States Senate is not required as the United States Secretary of State has this authority).⁵² This bilateral approach has strengthened the credibility of IJC reports and recommendations and ensured sufficient funding for its efforts.⁵³ These non-binding reports and studies, along with the objective recommendations that are often requested, have proven valuable in diplomatically resolving numerous international environmental disputes and crafting new policies in both

46. See Boundary Waters Treaty, *supra* note 8, art. VII, 36 Stat. at 2451; Hall, *supra* note 35, at 417; Woodward, *supra* note 32, at 328.

47. Hall, *supra* note 35, at 418 (citing Barry Sadler, *The Management of Canada-U.S. Boundary Waters: Retrospect and Prospect*, 26 NAT. RESOURCES J. 359, 370-72 (1986)).

48. *Id.* (citing Boundary Waters Treaty, *supra* note 8, art. X, 36 Stat. at 2452-53); see Woodward, *supra* note 32, at 328.

49. Hall, *supra* note 35, at 418 (citing U.S. CONST. art. II, § 2, cl. 2).

50. *Id.*

51. *Id.* at 418 n.71; see Woodward, *supra* note 32, at 329.

52. Hall, *supra* note 35, at 418 (citing Boundary Waters Treaty, *supra* note 8, art. IX, 36 Stat. at 2452; Daniel K. DeWitt, *Great Words Needed for the Great Lakes: Reasons to Rewrite the Boundary Waters Treaty of 1909*, 69 IND. L.J. 299, 308-14 (1993)).

53. DeWitt, *supra* note 52, at 313.

countries to prevent environmental harms from occurring.⁵⁴ As such, the IJC enjoys a well-deserved reputation for objective work, supported by the best science available and free from political biases, and serves as an important source of information for both the public and decision-makers in the United States and Canada.⁵⁵ However, under the terms of the Boundary Waters Treaty, the IJC does not give citizens any role in ensuring compliance with the substantive provisions of the treaty.⁵⁶

B. The Trail Smelter Arbitration

The most famous example of the IJC's role in arbitration and dispute resolution is the Trail Smelter arbitration.⁵⁷ This classic arbitration decision has been described as "having laid out the foundations of international environmental law, at least regarding transfrontier pollution."⁵⁸ It remains "the only decision of an international court or tribunal that deals specifically, and on the merits, with transfrontier pollution."⁵⁹ However, they also provide an example of traditional international adjudication between national governments with no role for affected or interested citizens.⁶⁰

The facts of the dispute are best told by quoting directly from the final 1941 arbitration decision:

In 1896, a smelter was started under American auspices near the locality known as Trail [in British Columbia, located on the Columbia River about seven miles north of the United States border and Washington State.] In 1906, the Consolidated Mining and Smelting Company of Canada, Limited . . . acquired the smelter plant at Trail. . . . Since that time, the Canadian company, without interruption, has operated the

54. *See generally id.* at 318-23.

55. Hall, *supra* note 35, at 418 n.72 ("Several commentators have noted the importance of the Boundary Waters Treaty and the International Joint Commission." (citing Prince, *supra* note 23, at 149-51; Sadler, *supra* note 47, at 370-72; Sharon A. Williams, *Public International Law and Water Quality Management in a Common Drainage Basin: The Great Lakes*, 18 CASE W. RES. J. INT'L L. 155, 178-79 (1986)). *But cf.* DeWitt, *supra* note 52, at 313-23 (noting the IJC's objectivity and independence, but limited and obscure role as a tool of the governments)).

56. *See generally* Boundary Waters Treaty, *supra* note 8.

57. *Trail Smelter I*, *supra* note 9; *Trail Smelter II*, *supra* note 9.

58. ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 107 (1991).

59. EDITH BROWN WEISS ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 257 (1998).

60. *See generally id.*

Smelter, and from time to time has greatly added to the plant until it has become one of the best and largest equipped smelting plants on the American continent. In 1925 and 1927, two stacks of the plant were erected to 409 feet in height and the Smelter greatly increased its daily smelting of zinc and lead ores. This increased production resulted in more sulphur dioxide fumes and higher concentration being emitted into the air. In 1916, about 5,000 tons of sulphur per month were emitted; in 1924, about 4,700 tons; in 1926, about 9,000 tons—an amount which rose near to 10,000 tons per month in 1930. In other words, about 300-350 tons of sulphur were emitted daily in 1930. . . .

From 1925, at least, to 1937, damage occurred [to private farms and timber lands] in the State of Washington resulting from the sulphur dioxide emitted from the Trail Smelter. . . .⁶¹

Despite the obvious severity of the pollution and the makings of a common law nuisance claim, the Washington landowners faced procedural obstacles in pursuing relief through domestic litigation in the courts of both British Columbia and Washington State:

Lawyers at the time were generally of the view that British Columbia courts would decline to assert jurisdiction in any action to recover for the property damage in Washington because of the rule announced by the House of Lords in *British South Africa Company v. Companhia de Moçambique*, 1893 A.C. 602. That case held that suits for damage to foreign lands are local actions and must be brought in the state where the land is located. Yet the Washington property owners would fare no better in that state since at the time it had no long-arm statute that would have permitted a Washington court to assert jurisdiction over the Canadian smelter.⁶²

With no domestic litigation options, the United States intervened on behalf of the Washington State landowners under the legal construct of espousal, in which the nation state takes on an international claim on behalf of its private citizens.⁶³ The decision of the United States to take on the claim of its citizens is significant, as the citizens would have had no other options for legal re-

61. *Trail Smelter II*, *supra* note 9, at 1945, reprinted in 35 AM. J. INT'L L. 684, 692-93 (1941).

62. WEISS ET AL., *supra* note 59, at 246.

63. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 902, cmt. i (1987).

lief. In 1928, the two countries agreed to refer the matter to the IJC for a factual study of the liabilities and damages.⁶⁴ In 1931 the IJC determined that the United States had suffered \$350,000 (equivalent to approximately \$4.67 million in 2006⁶⁵) in accrued damages through January 1, 1932, and recommended pollution controls to reduce future harm.⁶⁶ Despite the IJC report, in 1933, the United States was still not satisfied and again complained to the Canadian Government that “existing conditions were entirely unsatisfactory and that damage was still occurring.”⁶⁷

The subsequent diplomatic negotiations led to the United States and Canada signing and ratifying a Convention in 1935.⁶⁸ Through the Convention, the two countries agreed to refer the matter to a three-member arbitration tribunal composed of an American, a Canadian, and an independent chairman (a Belgian national was ultimately appointed).⁶⁹ The arbitration tribunal was charged with first determining whether damages caused by Trail Smelter continued to occur after January 1, 1932 and, if so, what indemnity should be paid.⁷⁰ Under the Convention, Canada had already agreed to pay the United States \$350,000 for damages prior to 1932, based on the findings of the IJC.⁷¹ The arbitration tribunal addressed this first question in its 1938 decision (*Trail Smelter I*), determining that the damages caused by the Canadian smelter to properties in Washington State from 1932 to 1937 amounted to \$78,000⁷² (equivalent to approximately \$1.1 million in 2006⁷³).

The arbitration tribunal’s more difficult, and ultimately more significant charge, was to decide whether the Canadian “[s]melter

64. See *Trail Smelter I*, *supra* note 9, at 1918, reprinted in 33 AM. J. INT’L L. 182, 191 (1938).

65. See Federal Reserve Bank of Minneapolis, Consumer Price Index Calculator, <http://minneapolisfed.org/Research/data/us/cal/> (last visited Jan. 2, 2007) [hereinafter Federal Reserve Bank of Minneapolis].

66. See *Trail Smelter I*, *supra* note 9, at 1918-19, reprinted in 33 AM. J. INT’L L. 182, 191-92 (1938).

67. *Id.* at 1919, reprinted in 33 AM. J. INT’L L. 182, 192 (1938).

68. Convention Relative to the Establishment of a Tribunal to Decide Questions of Indemnity and Future Regime Arising from the Operation of Smelter at Trail, British Columbia, U.S.-Can., Apr. 15, 1935, 49 Stat. 3245 [hereinafter Convention].

69. See *id.* art. II, 49 Stat. at 3246; *Trail Smelter I*, *supra* note 9, at 1911, reprinted in 33 AM. J. INT’L L. 182, 183 (1938).

70. See Convention, *supra* note 68, art. III, 49 Stat. at 3246.

71. See *id.* art. I, 49 Stat. at 3246.

72. See *Trail Smelter I*, *supra* note 9, at 1933, reprinted in 33 AM. J. INT’L L. 182, 208 (1938).

73. See Federal Reserve Bank of Minneapolis, *supra* note 65.

should be required to refrain from causing damage in the State of Washington in the future,” and what “measures or regime, if any, should be adopted or maintained by the . . . [s]melter, in addition to future “indemnity or compensation.”⁷⁴ To answer these questions, the tribunal was directed to “apply the law and practice followed in dealing with cognate questions in the United States of America as well as International Law and Practice, and . . . give consideration to the desire of the High Contracting Parties to reach a solution just to all parties concerned.”⁷⁵

Ultimately, the arbitral tribunal’s 1941 decision (*Trail Smelter II*) answered these questions and established a historic precedent for international transboundary pollution law.⁷⁶ The tribunal first concluded that there was no need to choose between the law of the United States or international law to decide the case, “as the law followed in the United States in dealing with the quasi-sovereign rights of the States of the Union, in the matter of [transboundary] pollution, whilst more definite, [is] in conformity with the general rules of international law.”⁷⁷ The tribunal cited a leading international law authority: “As Professor Eagleton puts it . . . ‘A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction.’”⁷⁸

The tribunal supplemented this general rule with a comprehensive summary of the United States Supreme Court’s decisions regarding interstate transboundary pollution, including cases both between two sovereign states and between a state and local governments or private parties (such as cities and mining companies).⁷⁹ Taking the decisions as a whole, the tribunal stated the following principles for transboundary pollution disputes:

[N]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the

74. Convention, *supra* note 68, art. III, 49 Stat. at 3246.

75. *Id.* art. IV, 49 Stat. at 3246.

76. *See generally Trail Smelter II, supra* note 9.

77. *Id.* at 1963, *reprinted in* 35 AM. J. INT’L L. 684, 713 (1941).

78. *Id.*

79. *See id.* at 1964-65, *reprinted in* 35 AM. J. INT’L L. 684, 714-16 (1941) (citing *New Jersey v. City of New York*, 283 U.S. 473 (1931); *New York v. New Jersey*, 256 U.S. 296 (1921); *Georgia v. Tenn. Copper Co.*, 237 U.S. 474 (1915); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 200 U.S. 496 (1906); *Kansas v. Colorado*, 185 U.S. 125 (1902)).

cause is of serious consequence and the injury is established by clear and convincing evidence.⁸⁰

The tribunal further held that “the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter.”⁸¹ Therefore, it is “the duty of the Government of the Dominion of Canada to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined.”⁸²

Applying these principles to the dispute at hand, the tribunal required the Trail Smelter to “refrain from causing any damage through fumes in the State of Washington.”⁸³ The tribunal specifically noted that such damage would be actionable under United States law in a suit between private individuals.⁸⁴ Further, the tribunal ordered a detailed management regime and regulations for the smelter to prevent sulphur dioxide emissions from reaching levels that cause property damage in Washington State.⁸⁵ The tribunal also indicated that it would allow future claims for damages that occur, despite the imposed management regime.⁸⁶

The liability rule of the Trail Smelter arbitration is a defining principle of international environmental law. It was incorporated into the United Nations Conference on the Human Environment, Stockholm Declaration of 1972, which provides in Principle 21 that:

States have, in accordance with the Charter of the United Nations and the principle of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.⁸⁷

80. *Id.* at 1965, reprinted in 35 AM. J. INT'L L. 684, 716 (1941).

81. *Id.*, reprinted in 35 AM. J. INT'L L. 684, 716-17 (1941).

82. *Id.* at 1966, reprinted in 35 AM. J. INT'L L. 684, 717 (1941).

83. *Id.*

84. *See id.*

85. *Id.*

86. *See Trail Smelter II*, supra note 9, at 1966-81, reprinted in 35 AM. J. INT'L L. 684, 717 (1941).

87. Declaration of the United Nations Conference on the Human Environment, at Princ. 21, U.N. Doc. A/CONF.48/14 and Corr. 1 (June 16, 1972), reprinted in 11 I.L.M. 1416, 1420 (1972), available at http://www.unep.org/dpdl/Law/PDF/Stockholm_Declaration.pdf.

This principle has since been reaffirmed in numerous other charters and declarations, most notably in Principle 2 of the United Nations Conference on Environment and Development, Rio Declaration of 1992,⁸⁸ and in section 601(1) of the Restatement (Third) of the Foreign Relations Law of the United States.⁸⁹ It should also be noted that while the principle is often declared, it has not been applied so as to actually prohibit all transboundary harm.⁹⁰ Instead, the principle is often considered to be limited to “significant or substantial” transboundary harm, and perhaps further limited to include only a duty by the source state to “undertake due diligence” to prevent significant or substantial transboundary pollution harms.⁹¹

For purposes of this discussion, however, it is the process that produced the ruling that is important. Both countries assumed the claims and liabilities of their private citizens and corporations, and sought to resolve the dispute through a diplomatic process that culminated in formal international tribunal arbitration. This commitment to environmental diplomacy is especially noteworthy given the pressing international concerns in the decade before World War II. The unusual willingness of the national governments to address an international environmental problem through binding arbitration is most remarkable and has not since been repeated in United States-Canadian history. Instead of giving rise to a legal regime of international arbitration with the interests of citizens represented by national governments, the Trail Smelter arbitration remains a historical anomaly. International environmental law soon took a back seat to World War II, the Cold War, and the economic and social issues of the 1950s and 1960s. When international environmental law came back in the 1970s, it took a very different form and relied far more on citizens for compliance.

88. See Rio Declaration on Environment and Development, Princ. 2, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I) (June 14, 1992), reprinted in 31 I.L.M. 874, 876 (1992).

89. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 601(1) (1987) (“A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control . . . are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.”).

90. See John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 AM. J. INT’L L. 291, 293 (2002) (“Although some scholars have still argued that all transboundary environmental harm should be presumptively unlawful, the idea that Principal 21 [of the 1972 Stockholm Declaration] prohibits all transboundary harm has generally been rejected.”).

91. *Id.* at 293-94.

**IV. PROVIDING A ROLE FOR CITIZEN
COMPLIANCE IN THE INTERNATIONAL
ENVIRONMENTAL LAW REGIME: MODERN
UNITED STATES-CANADIAN
ENVIRONMENTAL AGREEMENTS**

While the Boundary Waters Treaty and Trail Smelter arbitration were responses to disputes between United States and Canadian interests, modern environmental agreements between the United States and Canada are responses to binational environmental problems raised by citizens working together on both sides of the border. The GLWQA,⁹² the Air Quality Agreement,⁹³ and the NAAEC⁹⁴ mark a clear break from the Westphalian tradition of international law. These agreements were motivated by environmental concerns shared by citizens from both countries.⁹⁵ As a result, when viewed together and historically, the agreements show a clear evolution of the role of citizens in the international environmental law regime.

A. The Great Lakes Water Quality Agreement

In the years following World War II, citizens and scientists became increasingly alarmed about water pollution in the Great Lakes. In response to these concerns, the United States and Canada issued a joint reference to the IJC in 1964 regarding pollution in Lakes Erie and Ontario.⁹⁶ It took the IJC nearly seven years, but in 1970 it issued a report recommending new water quality control programs and the need for a new agreement for cooperative action in response to pollution.⁹⁷ Two years of negotiations followed, and in 1972 Prime Minister Pierre Trudeau and President Richard Nixon signed the GLWQA.⁹⁸

As stated in the 1972 GLWQA, the two countries were

[s]eriously concerned about the grave deterioration of water quality on each side of the boundary to an extent that is causing

92. See generally GLWQA 1972, *supra* note 17; GLWQA 1978, *supra* note 17; GLWQA 1987, *supra* note 17.

93. See generally Air Quality Agreement, *supra* note 18.

94. See generally NAAEC, *supra* note 19.

95. See generally *id.*; GLWQA 1972, *supra* note 17; GLWQA 1978, *supra* note 17; GLWQA 1987, *supra* note 17; Air Quality Agreement, *supra* note 18.

96. Int'l Joint Comm'n, *Pollution of Lakes Erie, Lake Ontario and the International Section of the St. Lawrence River* 3 (1971).

97. See *id.* at 1, 9.

98. GLWQA 1972, *supra* note 17, at 301.

injury to health and property on the other side, as described in the 1970 report of the International Joint Commission on Pollution of Lake Erie, Lake Ontario and the International Section of the St. Lawrence River.⁹⁹

The 1972 GLWQA sets forth general¹⁰⁰ and specific water quality objectives,¹⁰¹ provides for programs and other measures that are directed toward the achievement of the water quality objectives,¹⁰² and defines the powers, responsibilities and functions of the IJC.¹⁰³ However, the two federal governments (specifically the U.S. Environmental Protection Agency and Environment Canada), not the IJC, have primary responsibility for implementing the programs provided for and for achieving the objectives of the GLWQA.¹⁰⁴

The 1972 GLWQA focused on phosphorous pollution, and as sewage treatment improved and phosphate detergent bans were adopted in both countries, progress was made towards reducing the transboundary harms from this pollutant.¹⁰⁵ This success was tempered by new scientific discoveries and resulting public pressure to address persistent organic chemicals that “were already affecting the health of wildlife and could be a threat to human health.”¹⁰⁶ In response, the United States and Canada amended the GLWQA in 1978 with a new purpose:

to restore and maintain the chemical, physical, and biological integrity of the waters of the Great Lakes Basin Ecosystem. In order to achieve this purpose, the Parties agree to make a maximum effort to . . . eliminate or reduce to the maximum extent practicable the discharge of pollutants into the Great Lakes System.

Consistent with the provisions of this Agreement, it is the policy of the Parties that:

99. *Id.* at 302.

100. *Id.* art. II, at 304.

101. *Id.* art. III, at 304-05.

102. *Id.* art V, at 305-08.

103. *Id.* art. VI, at 308-09.

104. *See generally* GLWQA 1972, *supra* note 17.

105. Joseph DePinto & Thomas C. Young, *Great Lakes Quality Improvement*, ENVTL. SCI. & TECH. 20, n.8 (1986).

106. LEE BOTTS & PAUL MULDOON, *EVOLUTION OF THE GREAT LAKES WATER QUALITY AGREEMENT* 27 (2005).

- (a) The discharge of toxic substances in toxic amounts be prohibited and the discharge of any or all persistent toxic substances be virtually eliminated.¹⁰⁷

Nine years later the parties again revised the GLWQA after a comprehensive review and signed the 1987 Protocol.¹⁰⁸ The 1987 Protocol created provisions for “Remedial Action Plans” for “Areas of Concern” and “Lakewide Management Plans” which focused on critical pollutants and drew upon broad local community involvement.¹⁰⁹ While the Agreement has not been revised since 1987, the two countries and the IJC recently conducted a comprehensive review of the GLWQA to address emerging threats to the health of the Great Lakes.¹¹⁰

Despite the lofty goals of the GLWQA, its implementation has been undermined by its sub-treaty status (it was never subject to approval in the United States Senate) and its failure to contain enforcement provisions.¹¹¹ Attempts by citizens to enforce the GLWQA in court have not been particularly successful.¹¹² However, while the GLWQA lacks legally enforceable status in domestic courts, it has given citizens an increased role in shaping policy to address transboundary pollution in the Great Lakes.¹¹³

Prior to the GLWQA, in 1972 the IJC held public hearings on specific topics, but essentially conducted its business in private.¹¹⁴ Under increased citizen pressure resulting from the growing environmental movement, the GLWQA changed this custom and opened the IJC up to the public.¹¹⁵ The increased public involvement in the implementation of the GLWQA became one of its most

107. GLWQA 1978, *supra* note 17, art. II, 30 U.S.T. at 1387.

108. GLWQA 1987, *supra* note 17.

109. *See id.* art. VIII, at 7-12.

110. *See* Press Release, Int'l Joint Comm'n, IJC Recommends a New Great Lakes Water Quality Agreement for the 21st Century (Oct. 26, 2006), http://www.ijc.org/rel/news/061024_e.htm (last visited Jan. 15, 2006).

111. *See generally* Edith Brown Weiss, *Symposium on Prevention of Groundwater Contamination in the Great Lakes Region: New Directions for the Great Lakes Water Quality Agreement: A Commentary*, 65 CHI-KENT L. REV. 375, 377 (1989).

112. *See* Lake Erie Alliance for the Prot. of Coastal Corridor v. U.S. Army Corps of Eng'rs, 526 F. Supp. 1063, 1077 (D. Pa. 1981); *see also* Am. Iron & Steel Inst. v. EPA, 115 F.3d 979, 1001 (D.C. Cir. 1997).

113. David L. Markell, *Governance of International Institutions: A Review of the North American Commission for Environmental Cooperation's Citizen Submissions Process*, 30 N.C. J. INT'L L. & COM. REG. 759, 659-760 (2005).

114. *See* BOTTS & MULDOON, *supra* note 106, at 39.

115. *See id.* at 39-40.

significant results.¹¹⁶ The IJC affirmed its commitment to public participation in its Ninth Biennial Report:

The public's right and ability to participate in governmental processes and environmental decisions that affect it must be sustained and nurtured.

....

The Commission urges governments to continue to effectively communicate information that the public needs and has come to expect, and to provide opportunities to be held publicly accountable for their work under the Agreement.¹¹⁷

The increased opportunity for public participation in decision-making compensates, to some extent, for the GLWQA's failure to contain specific enforcement provisions. With increased public participation comes increased accountability on the part of both federal governments to comply with their joint responsibilities under the GLWQA. Equally important, the GLWQA has helped create an informed and engaged citizenry on both sides of the border, which has led to the increased role for citizen enforcement discussed in the following sections.

B. The Air Quality Agreement

The 1991 Air Quality Agreement between the United States and Canada¹¹⁸ was executed primarily in response to growing concerns over acid rain from sulfur dioxide air pollution; the agreement, however, covers all forms of transboundary air pollution between the two countries.¹¹⁹ The Air Quality Agreement was the product of a decade of diplomatic negotiations, commitments, and studies, formally originating with a 1980 Memorandum of Intent Concerning Transboundary Air Pollution.¹²⁰ When the United States aggressively addressed its acid rain pollution in the 1990

116. *See id.* at 39; *see also* THOMAS PRINCEN & MATTHIAS FINGER, ENVIRONMENTAL NGOS IN WORLD POLITICS 71 (1994).

117. *Ninth Biennial Report*, *supra* note 4.

118. Air Quality Agreement, *supra* note 18.

119. *Id.* art. I(2), 30 I.L.M. at 679.

120. Memorandum of Intent Concerning Transboundary Air Pollution, U.S.-Can., Aug. 5, 1980, 20 I.L.M. 690.

Amendments to the Clean Air Act,¹²¹ the foundation for a bilateral agreement with Canada was laid.¹²²

The Air Quality Agreement begins with both countries stating their mutual “[d]esir[e] that emissions of air pollutants from sources within their countries not result in significant transboundary air pollution.”¹²³ The countries reaffirm their commitment to Principle 21 of the Stockholm Declaration and:

their tradition of environmental cooperation as reflected in the Boundary Waters Treaty of 1909, the Trail Smelter Arbitration of 1941, the Great Lakes Water Quality Agreement of 1978, as amended, the Memorandum of Intent Concerning Transboundary Air Pollution of 1980, . . . [and] the ECE [Economic Commission for Europe] Convention on Long-Range Transboundary Air Pollution of 1979¹²⁴ [to which both the United States and Canada are parties].¹²⁵

While the scope of the Air Quality Agreement includes all transboundary air pollution, it contains specific objectives for each country for sulphur dioxide and nitrogen oxide emissions limitations.¹²⁶ The United States committed to the emissions limitations that the federal government had already imposed domestically under the 1990 Clean Air Act Amendments, and Canada’s commitments essentially followed its domestic goals.¹²⁷ The Air Quality Agreement further provides for assessment, noti-

121. 1990 Clean Air Act Amendments, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified at 42 U.S.C. §§ 7401-7700 (2000)). The 1990 Clean Air Act Amendments: recognize[d] that acid rain ‘represents a threat to natural resources, ecosystems, materials, visibility, and public health,’ that it is a problem of ‘international significance,’ that reductions in sulphur dioxide and nitrogen dioxide emissions would curb acid rain, that technology is currently available to control these emissions, and that delaying such remedies would adversely affect current and future generations.

Jeffrey L. Roelofs, *United States-Canada Air Quality Agreement: A Framework for Addressing Transboundary Air Pollution Problems*, 26 CORNELL INT’L L.J. 421, 443-44 (1993) (quoting 1990 Clean Air Act Amendments, Pub. L. No. 101-549, § 401, 104 Stat. 2399, § 401, 104 Stat. 2399, 2584 (1990) (codified at 42 U.S.C. § 7651)).

122. Roelofs, *supra* note 121, at 443-44 (“By recognizing the intricate problems of acid rain, [the 1990 Clean Air Act] amendments became the foundation for a bilateral agreement with Canada on transboundary air pollution.”).

123. Air Quality Agreement, *supra* note 18, 30 I.L.M. at 678.

124. Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, T.I.A.S. No. 10541, 18 I.L.M. 1442, available at <http://www.unece.org/env/lrtap/full%20text/1979.CLRTAP.e.pdf>.

125. Air Quality Agreement, *supra* note 18, 30 I.L.M. at 678.

126. *Id.* annex 1, 30 I.L.M. at 685-90.

127. *Id.*

fication, and mitigation of transboundary air pollution.¹²⁸ These duties are complemented by cooperative scientific and technical activities and research,¹²⁹ along with the coordinated exchange of information.¹³⁰

For purposes of this discussion, however, it is the citizen participation provisions of the Air Quality Agreement that are most noteworthy. The Air Quality Agreement relies on both a newly established "bilateral Air Quality Committee"¹³¹ and the IJC for implementation.¹³² While both of these bodies are comprised of representatives of the respective governments, the Air Quality Agreement requires both bodies to allow significant public participation in implementing their duties.¹³³ The Air Quality Committee is responsible for reviewing implementation progress and submitting biannual progress reports to the parties and the IJC.¹³⁴ The Air Quality Agreement specifically requires the Committee to release "each progress report to the public after its submission to the Parties."¹³⁵

As with the GLWQA, the Air Quality Agreement enlists the IJC as an implementing institution.¹³⁶ Building on the increased role that citizens played in the IJC's work on the GLWQA, the Air Quality Agreement mandates a role for citizens in the IJC's duties.¹³⁷ The IJC is required "to invite comments, including through public hearings as appropriate, on each progress report prepared by the Air Quality Committee pursuant to Article VIII."¹³⁸ The IJC must then submit to the two countries "a synthesis of the views" of the public,¹³⁹ and release this synthesis to the public after submission to the two governments.¹⁴⁰ As one commentator has noted, the mandated role for citizens "may pose some time costs, but such costs are outweighed by the benefits of

128. *Id.* art. V, 30 I.L.M. at 680-81.

129. *Id.* art. VI, 30 I.L.M. at 681.

130. *Id.* art. VII, 30 I.L.M. at 681.

131. *Id.* art. VIII, 30 I.L.M. at 682.

132. *Id.* art. IX, 30 I.L.M. at 682.

133. *Id.* arts. VIII, IX, 30 I.L.M. at 682; *see* Boundary Waters Treaty, *supra* note 8, art. VII, 36 Stat. at 2451.

134. Air Quality Agreement, *supra* note 18, arts. VIII, IX, 30 I.L.M. at 682.

135. *Id.* art. VIII(2)(d), 30 I.L.M. at 682.

136. *Id.* art. IX(1), 30 I.L.M. at 682.

137. *See id.* art. IX, 30 I.L.M. at 682.

138. *Id.* art. IX(1)(a), 30 I.L.M. at 682.

139. *Id.* art. IX(1)(b), 30 I.L.M. at 682.

140. *Id.* art. IX(1)(c), 30 I.L.M. at 682.

public participation and oversight in the implementation of the [Air Quality] Agreement.”¹⁴¹

The Air Quality Agreement further requires that “the Parties shall, as appropriate, consult with State or Provincial Governments, interested organizations, and the public” in implementing the agreement.¹⁴² This “provision provides a means by which . . . state or provincial governments, citizens, and interest groups, can exert substantial pressure on the [parties] to implement and effectuate the objectives of the agreement.”¹⁴³ Beyond the substance of the Air Quality Agreement, this may be its greatest significance, as none of the previous environmental agreements and treaties between the United States and Canada required public participation in reviewing and assessing compliance.

C. The North American Agreement on Environmental Cooperation

The NAAEC is a trilateral agreement between the United States, Canada, and Mexico.¹⁴⁴ It was intended to address environmental concerns related to the North America Free Trade Agreement (“NAFTA”) among the same three countries.¹⁴⁵ Environmentalists were concerned that increased trade under NAFTA would “overwhelm environmental infrastructure, especially along the U.S.-Mexico border.”¹⁴⁶ They were further concerned that

by removing barriers to foreign investment in Mexico, NAFTA would lure companies to move there in search of a “pollution haven,” and thereby contribute to the pollution of the Mexican environment, take jobs from U.S. workers, and put pressure on all three North American countries to lower their environmental standards in a “race to the bottom.”¹⁴⁷

While Mexico’s environmental laws were essentially equivalent to those of the United States, the perceived problem was inadequate compliance and enforcement.¹⁴⁸

141. Roelofs, *supra* note 121, at 449.

142. Air Quality Agreement, *supra* note 18, art. XIV, 30 I.L.M. at 684.

143. Roelofs, *supra* note 121, at 449.

144. NAAEC, *supra* note 19.

145. See John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 *ECOLOGY L.Q.* 1, 53 (2001).

146. *Id.*

147. *Id.* at 54.

148. *Id.*

To address these concerns, the NAAEC requires each party to “effectively enforce its environmental laws and regulations.”¹⁴⁹ The agreement established the North American Commission for Environmental Cooperation (“NACEC”),¹⁵⁰ composed of a Council of representatives of the three parties,¹⁵¹ a Secretariat with professional staff,¹⁵² and a Joint Public Advisory Committee (“JPAC”).¹⁵³ The JPAC is just one mechanism for public participation under the NAAEC, which states that one of its explicit objectives is to “promote transparency and public participation in the development of environmental laws, regulations and policies.”¹⁵⁴ Among the many notable provisions of the NAAEC, the citizen submission procedure provides the most direct role for citizens to promote compliance.

The NAAEC’s citizen submission procedure gives members of the public a direct means for addressing a specific concern related to environmental enforcement in one of the three NAFTA countries.¹⁵⁵ Submissions may be made to the NACEC Secretariat by “any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law.”¹⁵⁶ For the Secretariat to consider a submission, the submission must first meet some basic requirements regarding format and sufficiency of information, “be aimed at promoting enforcement rather than at harassing industry,” and “indicate[] that the matter has been communicated in writing to the relevant authorities of the Party and indicate[] the Party’s response, if any.”¹⁵⁷

Assuming these requirements are met, the Secretariat may then request a response from the government party concerned, taking into account the following Article 14(2) factors:

- (a) the submission alleges harm to the person or organization making the submission;
- (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;

149. NAAEC, *supra* note 19, art. 5(1), 32 I.L.M. at 1483-84.

150. *Id.* art. 8, 32 I.L.M. at 1485.

151. *Id.* art. 9(1), 32 I.L.M. at 1485.

152. *Id.* art. 11(1)-(2), 32 I.L.M. at 1487.

153. *Id.* art. 16, 32 I.L.M. at 1489.

154. *Id.* art. 1(h), 32 I.L.M. at 1483.

155. *Id.* arts. 14, 15, 32 I.L.M. 1488-89.

156. *Id.* art. 14(1), 32 I.L.M. at 1488.

157. *Id.* art. 14(1)(a)-(e), 32 I.L.M. at 1488.

- (c) private remedies available under the Party's law have been pursued; and
- (d) the submission is drawn exclusively from mass media reports.¹⁵⁸

When the Secretariat requests a party's response, it forwards "to the Party a copy of the submission and any supporting information provided with the submission."¹⁵⁹ The party must then promptly (within thirty days) "advise the Secretariat . . . [if] the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further."¹⁶⁰ The party may also reply with any other information, including information relating to "whether the matter was previously the subject of a judicial or administrative proceeding, and whether private remedies . . . are available . . . and . . . have been pursued."¹⁶¹ The Secretariat then considers both the citizen submission and the party's response, and recommends to the Council (essentially the three parties) whether a "factual record" should be prepared.¹⁶² While the NAAEC offers no additional guidance for the Secretariat's recommendation as to whether a factual record should be prepared, the type of information suggested for the party's response suggests that the Secretariat and NACEC will only take a matter if any available domestic remedies have been pursued. This would be both efficient and respectful of state sovereignty and domestic legal processes.

The ultimate decision on whether to prepare a factual record of submission rests not with the Secretariat but with the Council, which must authorize the factual record with a two-thirds vote.¹⁶³ Requiring a two-thirds vote, rather than a unanimous vote, allows the Council to authorize preparation of a factual record over the objections of the party the complaint is made against.¹⁶⁴ However, the decision to prepare factual records ultimately rests with the same governments that may be failing to effectively enforce the underlying laws.¹⁶⁵ The federal government parties (acting as the Council) have kept for themselves the final decision as to

158. *Id.* art. 14(2), 32 I.L.M. at 1488.

159. *Id.*

160. *Id.* art. 14(3)(a), 32 I.L.M. at 1488.

161. *Id.* art. 14(3)(b), 32 I.L.M. at 1488.

162. *Id.* art. 15(1), 32 I.L.M. at 1488.

163. Markell, *supra* note 113, at 765-66.

164. *Id.* at 766.

165. *See generally id.* at 783-93.

whether a factual record should be prepared.¹⁶⁶ Recognizing this potential conflict, the JPAC has suggested that the Council could “re-establish public confidence’ in the citizen submissions process . . . by making ‘every effort to ensure that the independence of the Secretariat is maintained.’”¹⁶⁷

If the Council authorizes preparation of a factual record, the Secretariat conducts an investigation, gathering information from the public, the JPAC, the party, and independent experts.¹⁶⁸ The Secretariat then produces a draft factual record for the Council’s comments.¹⁶⁹ Once finalized, the factual record may be made public by a two-thirds majority vote of the Council.¹⁷⁰ As the name implies, factual records are neither conclusory nor legally enforceable. However, they provide documented and credible information regarding an alleged failure to effectively enforce environmental law and are open to citizens of any party country. Professor Kal Raustiala describes this as “primarily an information-forcing mechanism. There are no direct sanctions employed; rather, the NAAEC employs a regulatory strategy of ‘sunshine.’”¹⁷¹

While the NAAEC provides an expanded role for citizens, a recent submission demonstrates that citizens are still unable to ultimately force compliance with international environmental commitments on unwilling federal governments. The citizen submission was made by both Canadian and U.S. environmental NGOs and citizens to address the United States’ and Canada’s lack of enforcement of their obligations to prevent transboundary pollution under the Boundary Waters Treaty in connection with the diversion of water from Devils Lake in North Dakota into Lake Winnipeg and other Canadian waters.¹⁷² According to the submission:

166. See generally *id.* at 765.

167. *Id.* at 790 (quoting Joint Public Advisory Committee, Advice to Council No. 04-03 (Aug. 23, 2004), available at http://www.cec.org/files/pdf/JPAC/Advice-04-03_en.pdf).

168. See NAAEC, *supra* note 19, arts. 15(4), 21(1), 32 I.L.M. at 1488-89, 1490.

169. *Id.* art. 15(5), 32 I.L.M. at 1489.

170. *Id.* art. 15(7), 32 I.L.M. at 1489.

171. Kal Raustiala, *Citizen Submissions and Treaty Review in NAAEC*, in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 256, 261 (David L. Markell & John H. Knox eds., 2003).

172. Submission of Friends of the Earth Canada et al., to the Commission for Environmental Cooperation at 1, SEM-06-002 (Devils Lake), (Mar. 24, 2006), available at http://www.cec.org/files/pdf/sem/06-2-SUB_en.pdf.

This is a cross-border issue that arises out of the construction and operation by the state of North Dakota of an outlet to drain water from Devils Lakes in the Sheyenne River, the Red River Basin, Lake Winnipeg, and ultimately the broader Hudson Bay drainage system. The project threatens direct and negative environmental impacts on Canadian waters, including the introduction of biological pollutants such as invasive species. . . .

. . . .
The construction of the artificial outlet from Devils Lake is an unlawful cause of transboundary pollution, contrary to [Boundary Waters] Treaty obligations. Both the U.S. and Canadian governments have a duty to resolve the dispute at the International Joint Commission.¹⁷³

The Secretariat responded by first issuing a determination that the submission did not satisfy the requirements of Article 14(1).¹⁷⁴ The Secretariat determined that the Boundary Waters Treaty provisions on which the submission was based (Articles IX and X) do not impose a specific, enforceable legal mandate to address questions regarding transboundary water pollution through referral to the IJC as required by the NAAEC:

The Boundary Waters Treaty . . . does not mandate referral to the IJC whenever a government has reason to believe that transboundary water pollution is occurring. . . . Thus, even if factual information were to indicate that because of the Devils Lake outlet, “boundary waters and waters flowing across the boundary” from North Dakota into Canada are “polluted . . . to the injury of health or property” in Canada, in apparent violation of Article IV of the treaty, the mandate to refer the matter to the IJC does not automatically follow.¹⁷⁵

The concerned Canadian and U.S. environmental NGOs and citizens resubmitted a revised petition, alleging that the transboundary pollution violates Article IV of the Boundary Waters Treaty.¹⁷⁶ The Secretariat again determined that the submission did not satisfy the requirements of Article 14(1) and dismissed the

173. *Id.*

174. Determination in Accordance with Article 14(1) of the North American Agreement for Environmental Cooperation, at 5, SEM-06-002 (Devils Lake) (June 8, 2006), available at http://www.cec.org/files/pdf/sem/06-2-DET14_1_en.pdf.

175. *Id.*

176. Submission of Friends of the Earth Canada et al., to the Commission for Environmental Cooperation at 1, SEM-06-002 (Devils Lake), (July 7, 2006), available at http://www.cec.org/files/pdf/sem/06-2-RSUB_en.pdf.

petition.¹⁷⁷ The Secretariat's determination was based, in part, on the finding that the Boundary Waters Treaty does not provide a role for citizens in ensuring compliance with the Treaty's substantive provisions.¹⁷⁸

The Secretariat's determination demonstrates the inherent weaknesses in the Westphalian approach of the Boundary Waters Treaty. While the Boundary Waters Treaty contains strong standards for transboundary water pollution, it does not provide a role for citizens to force compliance or resolve potential disputes through the IJC. Thus, if the federal governments choose to jointly ignore an environmental problem or resolve it without citizen input, citizens have no recourse under the Boundary Waters Treaty or through new mechanisms such as the NAAEC.

Despite some shortcomings, the NAAEC citizen submission process holds promise for improving compliance through citizen participation. Citizens have another formal mechanism to allege enforcement failures, and the publishing of factual records could create increased pressure to motivate governmental action. Professor Raustiala describes this as a "fire alarm" function which has some value in dispersing information regarding environmental enforcement.¹⁷⁹ It is too early to gauge the ultimate effectiveness of the citizen submission process, but, according to a leading scholar on the subject, "many of the submitters who have used the process appear to believe that it has helped to engender important changes in government enforcement behavior."¹⁸⁰

V. CONCLUSION

The GLWQA, the Air Quality Agreement, and the NAAEC give citizens an increased role in achieving compliance with the international environmental law regime. An obvious criticism is that the agreements fail to give citizens the ability to obtain a legally enforceable judgment to prevent international environmental harms, enforce standards, or obtain damages for past harms. This criticism, however, may be unfair in the context of international environmental law compliance. These agreements—as is common in international environmental law—rely on mechanisms

177. Determination in Accordance with Article 14(1) of the North American Agreement for Environmental Cooperation, at 7, SEM-06-002 (Devils Lake), (Aug. 21, 2006), available at http://www.cec.org/files/pdf/sem/06-2-DETN_en.pdf.

178. *Id.*

179. Raustiala, *supra* note 171, at 269.

180. Markell, *supra* note 113, at 791.

other than traditional legal enforcement to ensure compliance. These mechanisms should not be dismissed as just a poor substitute for legal enforcement. Professor Edith Brown Weiss notes that compliance in international environmental law can take many forms:

Lawyers frequently point to the remedies available to enforce binding agreements, such as judicial and other methods of adjudication, as an important distinguishing characteristic of binding agreements that affects compliance. But, there are other strategies available to encourage compliance that could apply to binding as well as nonbinding instruments. These strategies include various financial, diplomatic, and other incentives or blandishments, as well as coercive measures. Moreover, the institutional structure available to assist countries and nongovernmental actors in monitoring compliance may be as important as whether the instruments are binding.¹⁸¹

In this context, absent traditional legal enforcement, citizen participation is even more critical to ensure compliance. These agreements were entered into in response to citizen pressure and may only be as valuable as citizens make them. While scholars continue to debate whether judicial enforcement is preferable to other compliance mechanisms in international law,¹⁸² the question may be politically moot. It is highly unlikely that the United States would soon enter into a binding international treaty that subjects it—or its industries—to international adjudication to enforce environmental standards. Perhaps the day will come when national sovereignty gives way to international environmental law, but that day is not here yet. On the contrary, the United States may be moving away from that approach rather than towards it.

Taking a historical view, it could be argued that the heyday of international adjudication for environmental law came and went in the first half of the twentieth century. The Boundary Waters Treaty of 1909 created a mechanism for binding arbitration and even provided for the use of an umpire, chosen in accordance with the provisions of the Hague Convention of 1907, if the IJC deadlocked.¹⁸³ While not available to citizens and never invoked in the

181. Weiss, *supra* note 21, at 1569.

182. See generally INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS (Edith Brown Weiss et al. eds., 1997).

183. See Boundary Waters Treaty, *supra* note 8, art. X, 36 Stat. at 2453.

history of treaty, the mere inclusion of binding international adjudication is remarkable when compared to the lack of enforcement provisions in the United States-Canadian international environmental agreements of the past several decades.

The Trail Smelter arbitration also remains a historical anomaly, as such a dispute would likely be addressed through domestic litigation today.¹⁸⁴ With liberalization of jurisdictional rules in both countries and the growth of environmental enforcement opportunities under domestic law, citizens no longer need to rely on their federal governments to seek a remedy for transboundary pollution.¹⁸⁵ In fact, when citizens recently sought to remedy transboundary water pollution from the same Trail Smelter facility at issue in the original arbitration, they sued the company in United States federal court under United States domestic environmental law.¹⁸⁶

Looking to the future, is the growing role of citizens in international environmental law compliance going to lead to supranational adjudication with citizens bringing enforcement actions against foreign governments in international courts? Most likely it will not, at least in the relatively short time period in which society must address numerous pressing international environmental issues. If the yardstick for measuring the role of citizens in compliance is a right to legally enforceable supranational adjudication, then the United States-Canadian international environmental law regime comes up short. However, success can be demonstrated in numerous other ways, such as a citizenry that is more educated and engaged in international environmental issues, governments that are more responsive to international environmental concerns, and private actors that are more respectful of the international environmental commons. Anecdotes can be offered from both sides as to whether this is occurring, but absent much needed empirical studies on the subject, conclusions would be speculative. Perhaps demanding evidence of such successes should be the next step in the evolving role of citizens in international environmental compliance.

184. See Noah D. Hall, *Transboundary Pollution: Harmonizing International and Domestic Law*, 40 U. MICH. J. L. REFORM 681 (2007).

185. See *id.*; *Michie v. Great Lakes Steel Div., Nat'l Steel Corp.*, 495 F.2d 213 (6th Cir. 1974), *cert. denied*, 419 U.S. 997 (1974).

186. See *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1070 n.5, 1082 (9th Cir. 2006) (The claim involved the United States Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2001)).